2009

The Ohio Casualty Insurance Company v. Cloud Nine, LLC, et al... : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE OHIO CASUALTY INSURANCE COMPANY, et al., Plaintiff /Appellant, v. CLOUD NINE, LLC, et al., Defendant /Appellee.	)	APPELLANT'S OPENING BRIEF Case No. 20090340-SC U.S. Court of Appeals No. 08-4003

OPENING BRIEF OF APPELLANT

On Certification From The United States Court of Appeals
For the Tenth Circuit

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STATEMENT OF ISSUE CERTIFIED

The Utah Supreme Court has accepted the Tenth Circuit Court of Appeals' certified question of state law as follows:

> As to the Edizone case described by the certification order, whether the defense costs should be allocated between Appellant and Appellee under the "equal shares" method set forth in the "other insurance clause" of Appellant's policy or according to the "time on the risk" method described in Sharon Steel Corp. v. Aetna Casualty & Surety Co., 931 P.2d 127, 140 (Utah 1997).

STATEMENT OF THE CASE

This certification arises out of Appellant, Ohio Casualty Insurance Company's ("Ohio") appeal of the federal district court's order, granting Unigard Insurance Company's ("Unigard") motion for partial summary judgment, issued on November 14, 2006. Ohio appeals only that portion of the federal district court's order, requiring that defense costs in defending an underlying action, *Edizone, LC v. Cloud Nine, LLC, et al.*, Civil No. 1:04CV00117 TS ("Edizone Action"), be split equally between Unigard and Ohio, based upon the "other insurance" clauses in the successive policies. (Attachments, pp. 1-17; Aplt. App. v. 13, pp. 2062 – 2078). The federal district court's order with respect to all other issues was not appealed by Ohio.

This case originally concerned a request for declaratory judgment to determine the rights and obligations, if any, of West American Insurance Company [1] ("West American"), Ohio and Unigard to provide defense and indemnity to Cloud Nine, LLC, and its principals ("Cloud Nine") in the Edizone Action, a civil suit brought by a product and technology developer, Edizone, L.C. ("Edizone"), which licensed patents and other intellectual property to the Cloud Nine for manufacture and sale of a elastomer gel technology and product known

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[1] Unigard has admitted and agreed that none of the allegations in the Edizone Action alleged a covered advertising injury against Cloud Nine that could have occurred during the effective periods of the insurance policies issued by West American (June, 1998, through June, 2001), and therefore, no claim is made that West American owes a duty to defend or indemnify Cloud Nine and the entirety of the Appellant's brief will deal only with Ohio's duty under its insurance contract.

as "Gelastic" and "GellyComb". (Aplt. App. v. 1-2, pp. 16 – 438).

Ohio insured Cloud Nine for a one-year period from 6/10/2001 to 6/10/2002. (Aplt. App. v. 1, p. 19, ¶ 12). Cloud Nine had no insurance from 6/10/2002 to 12/12/2002. (Aplt. App. v. 6, p. 1091). Unigard thereafter insured Cloud Nine for the three-year period from 12/12/2002 to 12/12/2005. (Aplt. App. v. 3, p. 565, ¶ 2).

On May 22, 2006, Unigard filed its motion for partial summary judgment, arguing that both Ohio and Unigard had a duty to defend Cloud Nine in the Edizone Action and that all defense costs incurred in defending the Cloud Nine should be split equally (50/50) between Unigard and Ohio.[2] (Aplt. App. v. 4, pp. 623 – 658). Unigard based its argument upon the "other insurance" clause terms contained within the subject successive, non-concurrent policies issued by Ohio and Unigard. (Aplt. App. v. 3 pp. 654 – 656). Ohio opposed Unigard's motion for partial summary judgment, arguing that Unigard's reliance upon the "other insurance" clauses contained within the Ohio and Unigard policies was not supported by the plain language of the "other insurance" clauses themselves, case law interpreting such clauses, insurance law treatises, or the required "time on the risk" method of apportionment of defense costs required by this Court's decision in *Sharon Steel Corp. v. Aetna Cas. and Surety Co.*, 931 P.2d 127, 141-142 (1997). (Aplt. App. v. 6, pp. 1089 – 1091).

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[2] On June 20, 2006, Cloud Nine filed its joinder to Unigard's motion for partial summary judgment, however, it only joined in Unigard's coverage arguments and did not join in Unigard's or any other arguments related to allocation of defense costs. (Aplt. App. v. 5, pp. 1037-1040. Thus, Cloud Nine has waived any argument on this issue.

On September 21, 2006, the district court heard oral argument, Judge Tena Campbell presiding. (Aplt. App. v. 13, pp. 2155 – 2174). On November 14, 2006, the federal district court issued its ruling, granting Unigard's motion for partial summary judgment and ordering all defense costs and fees in the Edizone Action be shared equally between Ohio and Unigard without regard to each insurers' time on the risk. (Attachments, pp. 1-17; Aplt. App. v. 13, pp. 2062 – 2078). As a basis for its ruling, the federal district court relied on the "other insurance" clause terms contained within the non-concurrent, successive policies issued by Ohio and Unigard. (Attachments, pp. 15 – 17; Aplt. App. v. 13, pp. 2076 – 2078).

On November 28, 2006, pursuant to Fed. R. Civ. P. 59(e), Ohio filed a motion to reconsider the courts order allocating defense costs. (Aplt. App. v. 13, pp. 2079 – 2110). The district court denied Ohio's motion to reconsider on January 24, 2007. (Attachments, pp. 18-20; Aplt. App. v. 13, pp. 2132 – 2134).

On November 27, 2007, the federal district court's order, granting Unigard's motion for partial summary judgment and allocating defense costs became a final and appealable order when all remaining claims not decided by said order were dismissed, with prejudice, as Ohio and Unigard settled all claims asserted against Cloud Nine in the Edizone Action. (Attachments, pp. 21 - 23; Aplt. App. v. 13, pp. 2144 – 2146). Thereafter, Ohio timely filed its Notice of Appeal on December 27, 2007. (Aplt. App. v. 13, pp. 2147 – 2150).

Ohio and Unigard fully briefed the issues on appeal and submitted them to the Tenth Circuit.

Oral argument was held on the case before the Tenth Circuit on January 14, 2009. Barbara K. Berrett argued for Ohio and Rebecca L. Hill argued for Unigard and the case was submitted to Judges Henry, Brisco and Lucero. Subsequently on April 28, 2009, Tenth Circuit Court of Appeal Judges Henry, Brisco and Lucero certified a question of state law to the Utah Supreme Court.

The Utah Supreme Court, by order accepted the question certified to it on June 18, 2009.

STATEMENT OF RELEVANT FACTS

On July 6, 2005, Ohio filed its Complaint for Declaratory Judgment to determine the rights and obligations, if any, of West American, Ohio and Unigard in providing defense and indemnification for Cloud Nine in the Edizone Action. (Aplt. App. v. 1-2, pp. 16 – 438).

The Edizone Action was a civil suit brought by a product and technology developer, Edizone, which licensed patents and other intellectual property to the Cloud Nine for manufacture and sale of an elastomer gel technology and product known as "Gelastic" and "GellyComb". (Aplt. App. v. 1, pp. 54 – 103). From April 7, 1998 until March 11, 2002, Cloud Nine had a license agreement with Edizone, whereby they could use Edizone's trademarks and intellectual property. Id. However, on March 11, 2002, Edizone terminated Cloud Nine's license for failure to pay Edizone and other issues. (Aplt. App. v. 1, p. 61, ¶ 47).

Notwithstanding the earlier license termination on March 11, 2002, Edizone alleged that Cloud Nine continued to make, sell, and/or alter the elements of GellyComb products in

violation of its intellectual property rights. (Aplt. App v. 1, pp. 62 – 63). As a result of Cloud Nine's alleged infringement of Edizone's patents, trademarks, and tradenames while marketing, advertising, and selling Cloud Nine's products, Edizone filed suit on August 26, 2004. (Aplt. App. v. 1, pp. 54 – 103).

During the period of time that the alleged infringing acts occurred, Cloud Nine was insured by separate, non-concurrent insurance policies issued by Ohio[3] and Unigard.[4] Ohio provided insurance coverage to Cloud Nine for one year - June 10, 2001 to June 10, 2002. (Aplt. App. v. 2, p. 323). Unigard provided insurance coverage for a three-year period from December 12, 2002 to December 12, 2005. (Aplt. App. v. 4, pp. 632, 665; v. 5, pp. 820 - 984). During the six-month gap between the expiration of the Ohio policy on June 10, 2002, and the inception of the Unigard policy on December 12, 2002, Cloud Nine was uninsured. There is nothing in the record as to why Cloud Nine was uninsured for this six month gap.

As noted above, for the nine months of Ohio's policy from June 10, 2001 until March 11, 2002, Cloud Nine had a license agreement with Edizone, whereby they could use Edizone's trademarks and intellectual property, thus, Edizone could not and did not assert claims for any advertising injury during that period. Accordingly, Ohio only had three months on the risk, dating from the termination of the license agreement to the end of its policy period, i.e.;

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[3] Ohio Casualty Insurance Policy No. BKO (02) 52343482 effective June 10, 2001 to June 10, 2002. (Aplt. App. v. 1, p. 19, v. 2, pp. 322-437).

[4] Unigard Insurance Company Policy No. CM007917 (Aplt. App. v. 4, pp. 632, 655, v. 5, pp. 820-984). Unigard issued three consecutive policies effective December 12, 2002 to December 12, 2005. (Aplt. App. v. 3, pp. 565-570, v. 4, p. 665).

March 11, 2002 through June 10, 2002, during which an alleged advertising injury offense could have occurred. (Aplt. App. v. 2, pp. 323, 337)(emphasis added).

The Ohio policy provided liability insurance coverage for personal and advertising injury from June 10, 2001 to June 10, 2002. (Aplt. App. v 2, p. 337). Specifically, Coverage B of the Ohio policy "Insuring Agreement," in pertinent part, provides:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result.
>
> . . .
>
> **b.** This insurance applies to:
>
> ..."personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.
>
> . . .

(Aplt. App. v. 2, p. 337)(emphasis added).

The Ohio policy further contained an "other insurance" clause, that provides for equal sharing of defense costs for a covered loss, if and only if, other valid and collectible insurance is available to the insured for a loss covered by the Ohio policy. (Aplt. App. v. 2, pp. 342 – 343)(emphasis added). Specifically, the policy stated in relevant part:

Other Insurance

> If other valid and collectible insurance is available to the insured

for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

. . . .

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

(Aplt. App. v. 2, pp. 342-343)(emphasis added).

Unigard's subsequent policies beginning on December 12, 2002, also provided for personal and advertising injury liability coverage and its insuring provision and its "other insurance" clauses were identical to those under Ohio's policy. (Aplt. App. v.4, p. 632; v. 5. pp. 924 – 925). Additionally, Unigard's three policies issued to Cloud Nine provided $1,000,000.00 policy limits per year for three years. (Aplt. App. v. 3, pp. 565; v. 5, p. 906).

The Ohio one-year policy also had a $1,000,000.00 policy limit. (Aplt. App. v. 2, p. 324).

Notwithstanding the fact that the Ohio and Unigard policies were successive and not concurrent, Unigard filed a motion for partial summary judgment on May 22, 2006, arguing among other issues that as a matter of law all defense costs incurred in defending Cloud Nine should be split equally (50/50) between Unigard and Ohio. (Aplt. App. v. 4, pp. 654 – 656). Unigard's argument was based upon the policies "other insurance" clauses that provided for an equal distribution of defense costs when other valid and collectible insurance is available to the insured for a loss covered by the policy. (Aplt. App. v. 4, pp. 655 – 656).

On August 21, 2006, Ohio responded to Unigard's motion for summary judgment arguing, in part, that the "other insurance" clause only applies to concurrent coverage of another insurer for losses that occurred during the June 10, 2001 to June 10, 2002 policy period. (Aplt. App. v. 6, pp. 1089 – 1091). Ohio further argued because the "other insurance" clause was inapplicable to successive insurance policies, the "time on the risk" defense cost allocation method mandated by the Utah Supreme Court in *Sharon Steel v. Corp. v. Aetna Cas. And Surety Co.*, 931 P.2d 127 (1997) controls.

Nevertheless, the federal district court accepted Unigard's arguments and relying upon the "other insurance" clauses contained in Ohio and Unigard policies, held that all defense costs and fees in the Edizone Action be shared equally between Ohio and Unigard without regard to each insurers' time on the risk. (Attachments, pp. 15 – 17; Aplt. App. v. 13, pp. 2076 -

2078).[5]

The federal district court's order was appealed, fully briefed and oral argument was held on January 14, 2009, before the Tenth Circuit Court of Appeals.

SUMMARY OF THE ARGUMENTS

The Tenth Circuit Court of Appeals has certified a legal question to this Court, asking whether under Utah law, the defense costs incurred by Ohio and Unigard in defending the insured in the underlying Edizone Action should be allocated between Ohio [Appellant] and Unigard [Appellee] under the "equal shares" method set forth in the "other insurance" clauses of Ohio's and Unigard's policies or according to the "time on the risk" method prescribed in this Court's opinion in *Sharon Steel Corp. v. Aetna Cas. and Surety Co.*, 931 P.2d. 127, 140 (Utah 1997).

It is Ohio's position that the federal district court incorrectly relied upon the "other insurance" clauses contained in Ohio's and Unigard's policies to allocate the defense costs because the "other insurance" clauses are only applicable when there is concurrent coverage for the same loss actually covered by two or more insurance policies. Here, Ohio's and Unigard's insurance policies are successive and not concurrent, which Unigard's counsel

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[5] The total defense costs incurred in defending Cloud Nine in the Edizone Action were $2,698,950.77. As a result of the federal district court decision, Ohio has paid $1,304,558.10 in defense costs (in addition to settlement monies) although there were only three months during which Cloud Nine could have caused an advertizing offense during Ohio's policy because Cloud Nine had a licence agreement to advertise the goods until March 12, 2002.

conceded during oral argument at the Tenth Circuit. Clearly then, the equal apportionment language in the "other insurance" clauses are not controlling, when determining the proper method of apportionment of defense costs in this case.

The federal district court below, in reaching its conclusion in this matter, relied upon *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 210 (Utah 2006). However, the *Benjamin* case clearly does not address the issue of how insurance carriers should equitably allocate defense costs between successive insurance providers. Instead, *Benjamin* simply addresses the duty to defend when there are covered and non-covered claims asserted in the same lawsuit and one policy applies. *See Benjamin* 140 P.3d at 1216. Indeed, the *Benjamin* case did not involve a continuing injury claim spanning successive policies and policy years. In a continuing injury case such as the instant case, successive policies insure the same type of risk, but not the same risk, because to hold that successive policies cover the same risk would render an insurer liable for damage occurring outside its policy period. Ohio's policy covers personal injury and advertizing injury losses "only if the offense was committed...during its policy period."

To avoid the time on the risk method of apportioning defense costs set forth in *Sharon Steel*, Unigard claims that the "other insurance" clauses, although not applicable here, constitute express policy language which decrees the method of apportionment. *See Sharon Steel*, 931 P.2d at 140. However, this is not the case. Again, at oral argument at the Tenth Circuit Court of Appeals, Unigard's counsel conceded that the policies at issue in the *Sharon*

Steel case more than likely all had "other insurance" clauses in the policies, because "other insurance" clauses have been standard in CGL policies since approximately the 1950s. The "other insurance" clauses by their own language simply do not apply here as evidence of any such intent because the policies are successive and not concurrent.

A similar analysis was recently made by the Supreme Judicial Court of Massachusetts in *Boston Gas Co. v. Century Indemnity Co.*, 454 Mass 337, 910 N.E.2d 290 (Mass. 2009) ("the Boston case"). That case, as here, involved the First Circuit Court of Appeals, certifying questions of state law regarding the allocation of damages amongst the insured, when self insured, and insurance carriers when there were successive policies in a "progressive injury"case. The *Boston* Court specifically looked at the "other insurance" clauses in standard CGL policies and found that those clauses do not reflect an intention to cover losses for damages outside the policy period and do not apply to successive coverage situations. Id. at 308-09.

In this particular continuing injury case, as in *Sharon Steel*, and the *Boston* case, the only fair and equitable way of dividing the approximately two million dollars plus in defense costs among the parties here, is to use the "time on the risk" allocation adopted by this Court some years ago. Ohio therefore respectfully requests that this Court find that the other insurance clauses are not applicable here by the policies' own terms and that the defense costs should be divided amongst Ohio, Unigard and the insured by the time on the risk allocation method adopted by this Court in *Sharon Steel*.

ARGUMENT

I. OHIO'S AND UNIGARD'S "OTHER INSURANCE" CLAUSES DO NOT APPLY IN THIS CASE, NOR DO THEY GOVERN THE ALLOCATION OF DEFENSE COSTS AS BETWEEN OHIO AND UNIGARD.

In this case, Ohio's policy provides for equal sharing of defense costs for a covered loss, *if and only if*, other valid and collectible insurance is available to the insured for a loss covered by the policy. (Aplt. App. v. 1, pp. 342 – 343) (emphasis added). Specifically, Ohio's "other insurance" clause states in relevant part:[6]

> **Other Insurance**
>
> **If other valid and collectible insurance is available to the insured *for a loss we cover*** under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> . . . .
>
> b. Method of Sharing
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

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[6] The "other insurance" clause contained within Ohio's single policy effective June 10, 2001 to June 10, 2002 is verbatim the same "other insurance" clause contained in all three of Unigard's policies effective December 12, 2002 to December 12, 2005. (Aplt. App. v. 3, pp. 924 – 925.

> If any other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

(Aplt. App. v. 1, pp. 342 - 343)(emphasis added).

For a "loss" to be covered by Ohio's policy it must occur during the policy period - June 10, 2001 to June 10, 2002.[7] (Aplt. App. v. 2, p. 337). Thus, in order to apply the 50/50 loss allocation method provided within Ohio's "other insurance" clause, there must be *other collectible insurance* available to Cloud Nine for a loss covered during Ohio's effective policy period of June 10, 2001 to June 10, 2002. In other words, to allocate costs equally among the insurers, Ohio and Unigard's policies must provide *concurrent* liability coverage for the same loss.

Ohio and Unigard's policies are successive not concurrent. Ohio's policy coverage period was effective from June 10, 2001 to June 10, 2002. (Aplt. App. v. 2, p. 323). Unigard's policy coverage periods spanned from December 12, 2002 to December 12, 2005; beginning six months after the expiration of Ohio's policy period. (Aplt. App. v. 4, pp. 632,

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[7] Ohio's Policy specifically states:

1. **Insuring Agreement.**

...

b. This insurance applies to:
"personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed . . .during the policy period.

See (Aplt. App. v. 1, p. 337)(emphasis added).

665; v. 5, pp. 820 -984)(emphasis added). Because the policies are successive and not concurrent, any loss covered by any of Unigard's three policies would, by definition, *not* be covered by Ohio's single policy because it would have occurred outside Ohio's express policy coverage period. (Aplt. App. v. 2, p. 337).

Contrary to the federal district court's findings, a loss covered by Ohio's policy cannot span beyond its express policy period into any of Unigard's policy periods and remain a *covered* loss for both carriers' policies. (Attachments, p. 16; Aplt. App. v. 13, p. 2077); In *Sharon Steel Corp. v. Aetna Cas & Surety, Co.*, 931 P.2d 127, 141 (Utah 1997), this Court noted that "[i]nsurer has not contracted to pay defense costs for occurrences which took place outside the policy period" (emphasis added). Indeed the federal district court's decision focused on the broad interpretation of the single term "loss" contained within the "other insurance" clauses. (Attachments, p. 16; Aplt. App. v. 13, p. 2077). However, although the term "loss" used by itself may be interpreted broadly, its application must be limited by the express terms that surround it. Here, the term "loss" is followed by the terms "we cover." Thus, the "other insurance" clause's alternative methods of apportionment are limited to circumstances where other insurance is available for a loss actually covered by Ohio's policy. As noted above, while it is true that a "loss" may span successive policy periods, it still must fall within Ohio's policy period to be a *covered* loss. (Aplt. App. v. 2, p. 337)(emphasis added).

This is true even if the loss is the same *type* or *kind* of loss covered by Ohio's policy.

To invoke the "other insurance" clause, Unigard's policies must also provide liability coverage for the same time period as the Ohio policy, and they simply do not. (Aplt. App. v. 2, p. 323; v. 4, pp. 632, 665; v. 5, pp. 820 -984). See e.g. *Taco Bell Corp. v. Continental Casualty Co.,* 388 F.3d 1069 (7th Cir. 2004)(finding that "other insurance" clauses are only applicable to concurrent coverage and do not apply to successive policies covering different policy periods); ¶ 7:1, Allan D. Windt, *Insurance Claims and Disputes* (4th ed.) at 895 (2001); *Secura Ins. Co. v. Cincinnati Ins. Co.*, 497 N.W. 2d 230, 232 (Mich. Ct. App. 1993); *Alberici v. Safeguard Mutual Ins. Co.,* 664 A.2d 110, 114 (Pa. 1995); *NL Indus. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 518 (D.N.J. 1996). To find otherwise, violates the plain meaning of the "other insurance" clauses' express terms and, in effect, improperly makes Ohio liable in part for occurrences outside the period expressly covered by its policy. Id.

In *Taco Bell Corp. v. Continental Casualty Co.*, the Seventh Circuit specifically addressed the issue whether to apply "other insurance" clauses to successive policies in determining allocation of costs among different insurers that gives rise to this appeal. 388 F.3d 1069 (7th Cir. 2004). In *Taco Bell*, an insured corporation brought a declaratory judgment action against two successive liability insurers seeking a declaration that the insurers had a duty to defend it from claims alleging the misappropriation of an advertising campaign. Id. at 1071. The trial court determined that both insurers had a duty to defend and further ordered, based upon the policies' "other insurance" clauses, that each insurer was

responsible for one half of the defense costs incurred. Id. at 1078.

On appeal the Seventh Circuit held that the trial court's reliance on the "other insurance" clauses was improper because such clauses are not applicable in cases where "two policies, each with an 'other insurance' clause, insure merely the same *kind* of risk, but not the same risk because the policies are successive." Id. at 1079 (emphasis added). In addressing this issue the court stated:

> What is true though unremarked by the parties is that the ground on which the district court split the defense costs equally between the two insurers was highly questionable. The court relied on 'other insurance' clauses in the two policies. An 'other insurance' clause limits an insurer's liability when the risk he has insured against is also covered by another insurer's policy. If two insurers have identical other-insurance clauses in policies that cover the same risk, a common and deliciously simple solution is to divide the liability between them 50-50. But this analysis does not fit the case in which the two policies, each with an 'other insurance' clause, insure merely the same *kind* of risk, but not the same risk because the policies are successive. To apply 'other insurance' clauses in such a case would make insurers liable in part for occurrences outside the period covered by their policies.

Id. (citations omitted.)

This principle and proper interpretation and application of the "other insurance" clauses are aptly illustrated by the following analysis:

> Addressing the issues raised when several insurers cover the same risk requires an understanding of what constitutes 'other insurance' and 'multiple insurance.' . . . "Other insurance" refers only to two or more policies insuring the same risk, and the same interest, for the benefit of the same person, during

> the same period.[8] Courts and litigants often liberalize this somewhat restrictive definition, describing the interplay between insurance policies as though there were no requirement of concurrent policies. Thus, consecutive policies may be thought to constitute "other insurance," so long as the risk and insured interest superficially remain the same. Such treatment or definition is seriously flawed, however, because while successive policies might insure the same type of risk, they do not insure the same risk. Moreover, so generous a definition wrongly suggests that insurers might be liable for damages occurring outside their policy periods. The fact that "other insurance" clauses in policies only operate when there is a concurrent coverage highlights[9] these definitional problems.

See Douglas R. Richmond, "Issues and Problems in 'Other Insurance,' Multiple Insurance

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[8] See *American Ins. Co. v. Freeport Cold Storage, Inc.*, 703 F. Supp. 1475, 1485 (D. Utah 1987); *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551, 561 (Ala. 1994); *Insurance Co. of N. Am. v. Nicholas*, 533 S.W.2d 204, 206 (Ark. 1976); *Nolt v. United States Fidelity & Guar. Co.*, 617 A.2d 578, 579- 84 (Md. 1993); *McCormick v. Travelers Indem. Co.*, 496 N.E.2d 174, 176 (Mass. App. Ct. 1986); *Upjohn Co. v. New Hampshire Ins. Co.*, 444 N.W.2d 813, 819- 20 (Mich. Ct. App. 1989), rev'd on other grounds, 476 N.W.2d 392 (Mich.), reh'g denied, 503 N.W.2d 442 (1991); *Retail Sys., Inc. v. CNA Ins. Cos.*, 469 N.W.2d 735, 738 (Minn. Ct. App. 1991); *B.K. Gen. Contractors, Inc. v. Michigan Mut. Ins. Co.*, 612 N.Y.S.2d 198, 199 (App. Div. 1994); *Mutual Benefit Ins. Co. v. Goschenhoppen Mut. Ins. Co.*, 572 A.2d 1275, 1277 (Pa. Super. Ct. 1990); *National Grange Mut. Ins. Co. v. Firemen's Ins. Co.*, 425 S.E.2d 754, 757-58 n.4 (S.C. Ct. App. 1992); *State Farm Fire & Cas. Co. v. Griffin,* 888 S.W.2d 150, 155 (Tex. Ct. App. 1994).

[9] See *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 241 (4th Cir. 1990) (applying North Carolina law); *In re Prudential Lines, Inc.*, 170 B.R. 222, 235-36 (S.D.N.Y. 1994) (applying New York law); *Pines of La Jolla Homeowners Ass'n v. Indus. Indem.*, 7 Cal. Rptr. 2d 53, 58- 59 (Ct. App. 1992); *Pafco Gen. Ins. Co. v. Providence Washington Ins. Co.*, 587 N.E.2d 728, 729 n.2 (Ind. Ct. App. 1992); *Continental Cas. Co. v. Medical Protective Co.*, 859 S.W.2d 789, 791 (Mo. Ct. App. 1993); *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 991, 995 (N.J. 1994); *Orsi v. Aetna Ins. Co.*, 703 P.2d 1053, 1058 (Wash. Ct. App. 1985); see *Transamerica Ins. Group v. Turner Constr. Co.*, 601 N.E.2d 473, 476-77 (Mass. App. Ct. 1992); *Secura Ins. Co. v. Cincinnati Ins. Co.*, 497 N.W.2d 230, 232 (Mich. Ct. App. 1993); *Northern States Power Co. v. Fidelity & Cas. Co.*, 523 N.W.2d 657, 664 (Minn. 1994); *Board of Vocational Educ. v. Janicki,* 422 S.E.2d 822, 825 (W. Va. 1992).

and Self-Insurance," 22 PEPP. L. REV. 1373, 1376 – 77 (1995); ¶ 7:1, Allan D. Windt, Insurance Claims and Disputes (4th ed.) at 895 (2001). See also, *Secura Ins. Co. v. Cincinnati Ins. Co.*, 497 N.W.2d 230, 232 (Mich. Ct. App. 1993); *Alberici v. Safeguard Mutual Ins. Co.*, 664 A.2d 110, 114 (Pa. 1995); *NL Indus. v. Commercial Union Ins. Co.*, 935 F.Supp. 513, 518 (D.N.J. 1996).

Although, the *Taco Bell* Court did ultimately affirm the trial court's equal allocation of defense costs, its ruling was not based on the "other insurance" clauses, rather it was based on Illinois law and the fact that neither party suggested any better method of dividing the costs. Id. at 1079.

A new case, *Boston Gas Company v. Century Indemnity Co.*, 454 Mass. 337, 910 N.E.2d 290 (Mass. 2009), rendered by the Supreme Judicial Court of Massachusetts on July 24, 2009, provides a particularly persuasive and germane discussion of the very issue presented by the Tenth Circuit Court of Appeals here. In that case, the First Circuit Court of Appeals, just like the case here, certified questions of state law to the Supreme Judicial Court of Massachusetts.

In the *Boston* case, an insured, the Boston Gas Company ("Boston"), and former operator of a manufactured gas plant sued one of its general liability insurance carriers, Century Indemnity Company ("Century"), seeking a declaration that Century had a duty to indemnify it for all the cost of cleanup of an off-site, tar contaminated property caused by Boston's operations over many years. The case was filed in the federal district court of

Massachusetts and the case went to a jury. The federal district court entered a verdict in favor of the insured Boston and denied Century's post verdict motions. The case was appealed to the First Circuit Court of Appeals, who certified three questions to the Supreme Judicial Court of Massachusetts. Id. at 292.

The first question certified was "where an insured is protected by a standard commercial general liability policy and incurs covered costs as a result of ongoing environmental contamination occurring over more than one year and the insurer provided coverage for less than the full period of years in which contamination occurred, should direct liability of the sued insurer be pro-rated in some manner among all insurers on the risk, limiting the direct liability of the sued insurer to its share but leaving the insured free to seek the balance from other insurers." Id. at 292-93. The second issue certified was "if some form of pro rata liability is called for in such circumstances, what allocation method or formula should be used?" Id. And finally, issue number three was "if a single insurer in such circumstances is subject to liability under more than one policy and each policy has a separate deductible or separate self insured retention, should the insured be able to collect covered losses from a single policy subject only to the policies deductible or self insured retention or should liability be reduced by the sum of the applicable self insured retention effectively allocating total liability across the policies of that insurer in effect during the contamination period." Id.

The Supreme Judicial Court of Massachusetts noted that in prior years the

Massachusetts Court of Appeals had found in similar circumstances involving a continuing injury (which it refers to as a "progressive injury"), had determined that a joint and several allocation should be used. The issue on allocation under these circumstances was one of first impression to the Supreme Judicial Court of Massachusetts. The *Boston* Court outlined the underlying facts of the case, noting that the off-site tar contamination occurred over numerous years and numerous policies and that for part of those years, the insured either had a self insured retention and/or a deductible applied. It likewise noted that in all the policies there were "other insurance" clauses similar to the "other insurance" clause presented here today. Id. at 296. It acknowledged that the First Circuit Court of Appeals in certifying the issues noted in its certification that there was a split of authority among other states and concluded that a "growing plurality" of states apply the pro-rata allocation. Id. at 298.

Ironically, the *Boston* Court, at page 303, and footnote 29, concluded that the State of Utah was among a number of other states, who adopted a pro-rata allocation and specifically cites the *Sharon Steel* opinion. Id. at 303 fn. 29.

The *Boston* Court looked at all the various methods being used by various states today and then analyzed the standard CGL policies and concluded that "a pro-rata allocation of losses is consistent with, if not compelled by the most reasonable construction of the policies at issue here." Id. at 306. Specifically, the Supreme Judicial Court of Massachusetts looked at the fact that the policies at issue were all limited to property damage which occurs during the policy period. It determined that the most reasonable reading of provisions within a

policy that limit coverage for claims that happen during a policy period is that each insurer only provides coverage for liability attributable to the damages, or here offenses, occurring during the given policy period. Id. at 307. Indeed, the *Boston* Court stated:

> [T]he policies' "other insurance" clauses do not reflect an intention to cover losses for damages outside the policy period. Rather, the "other insurance" clauses simply reflect a recognition of the many situations in which concurrent not successive coverage would exist for the same loss.

Id. at 308.

Footnote 36, which accompanies the above referenced quote states exactly what Ohio has been saying here as follows:

> FN36. " 'Other insurance' refers only to two or more concurrent policies, which insure the same risk and the same interest, for the benefit of the same person, during the same period. However, 'other insurance' clauses are not intended to allocate liability among successive insurers because they do not insure the same risk and would unjustly make consecutive insurers liable for damages occurring outside their policy periods." 23 E.M. Holmes, Appleman on Insurance § 145.4[C], at 34 (2d ed. 2003).
>
> "Historically, 'other insurance' clauses were designed to prevent multiple recoveries when more than one policy provided coverage for a given loss.... An example of a typical multiple-coverage case is the situation in which a loss is incurred by an insured driver while driving an automobile of an insured owner with the owner's permission.... In such a case both policies clearly cover the entire loss." (Citations omitted.) *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 470, 650 A.2d 974 (1994).

Id. at 309 fn.36.

The *Boston* Court finally notes that in the policies at issue in that case, there was no so called "non-cumulation" clause which would provide continuing coverage beyond the policy period. Id. There is no "non-cumulation" clause in the Ohio policy either. The *Boston*

Court concluded that the policies there do not provide coverage for damages that occur outside the policy period, and thus the other insurance clauses do not apply.

Likewise, under the plain language of the Ohio and Unigard policies, the "other insurance" clauses do not apply to allocate defense costs here and so this Court should find, as it did in *Sharon Steel,* that the proper method to allocate defense costs here is time on the risk.

II. THE "OTHER INSURANCE" CLAUSES FOUND IN THE OHIO AND UNIGARD POLICIES DO NOT CONSTITUTE "EXPRESS POLICY LANGUAGE THAT DECREES THE METHOD OF APPORTIONMENT" WHICH WOULD PRECLUDE THE APPLICATION OF THE TIME ON THE RISK ALLOCATION.

Unigard has argued that, if in fact Unigard's policies do not technically constitute "other insurance," then Unigard contends that the "other insurance" clauses in the successive policies constitute the "express policy language that decrees a different method of apportionment" referred to in the *Sharon Steel* case that would obviate the need to apply a "time on the risk" allocation. Indeed, Unigard asserts, the "time on the risk" method implemented by the Utah Supreme Court in *Sharon Steel* was merely "guidance" for the trial court when allocating defense costs. As foundation for this argument, Unigard argues that the *Sharon Steel* Court appeared to have found that the policies at issue in that case did not provide a method of apportionment, implying that the policies at issue in *Sharon Steel* did not contain "other insurance" clauses. *See* Unigard's Tenth Circuit Appellee Brief. Making such an inference would be incorrect.

As this Court is aware, *Sharon Steel* involved Aetna, Hartford and AMICO insurance contracts issued from January of 1966 through April of 1980. *Sharon Steel Corp. v. Aetna Cas & Surety Co., et al.,* 931 P.2d at 130. "Other insurance" clauses originated in property insurance and were initially inserted to discourage an insured from over insuring against a particular loss. *State Farm Mutual Auto Ins. Co. v. Bogart*, 717 P.2d 449, 452 (Ariz. 1986); *Sloviaczek v. Estate of Puckett*, 565 P.2d 564, 566 (1977). Thus, the idea of reducing an insurers liability where there was "other insurance" covering the loss originally protected the insurer against fraudulent recovery. Id.

Nevertheless, "other insurance" provisions came to be included in many liability policies even though the possibility of over insurance inducing fraudulent claims was remote in such policies. Id. Indeed, as early as 1952 "other insurance" clauses were widely used in all liability insurance policies, including auto policies. *See, e.g. Oregon Auto Ins. Co. v. USF&G, Co.*, 195 F.2d 958 (9th Cir. 1952). Thus, Unigard's assumption that there was not "other insurance" clauses in the policies interpreted in the *Sharon Steel* case, which ran from 1966 to 1980, is unfounded and Unigard's counsel conceded this issue at oral argument before the Tenth Circuit.

A more sound conclusion in keeping with case law and authoritative texts on this subject is that the *Sharon Steel* Court did not analyze the "other insurance" clauses because the policies in *Sharon Steel,* as in this case, were successive and not concurrent and thus the "other insurance" clauses were inapplicable.

Thus, Ohio requests that this Court answer the Tenth Circuit's certified question by declaring that the defense costs should be allocated by the "time on the risk" formula set forth in *Sharon Steel* and find that Ohio is only obligated to pay its share of defense costs in relation to the three months that it was on the risk when the insured could have caused an advertising injury.

III. THE TIME ON THE RISK ALLOCATION OF DEFENSE COSTS IS THE MOST EQUITABLE METHOD AND IS THE ONLY METHOD CONSISTENT WITH THE POLICY LANGUAGE AS WELL AS IMPORTANT PUBLIC POLICY OBJECTIVES.

As an alternative argument, Unigard asserts that under the *Benjamin v. Amica Mutual Insurance Co.,* 140 P.3d 1210 (Utah 2006) case, a general duty to defend shared among successive co-insurers justifies equal apportionment of defense costs as found by the district court. (Appellee's Brief at Tenth Circuit, pp. 17-25). However, in Utah, an insurer's duty to defend all covered and non-covered claims asserted in an action does not, standing alone, require or justify equal allocation of the costs incurred in that defense. In fact, as admitted by Unigard in its brief, the *Benjamin* decision does not address the issue of how insurance carriers should equitably allocate defense costs between successive insurance providers. (Appellee's Brief at the Tenth Circuit, p. 23).

Utah law clearly distinguishes an insurer's duty to defend under a policy as separate and distinct from the allocation of incurred defense costs among successive insurers. *Sharon Steel Corporation v. Aetna Casualty and Surety Company, et al.*, 931 P.2d 127, 140 (Utah 1997) (Acknowledging that the mere recognition that an insurer has a duty to defend does not resolve the issue of how, absent express contractual language, a trial court should equitably apportion those defense costs). A co-insurer's equal obligation to defend, at most, only provides an insurer the right

to seek contribution from a co-insurer to "pay its share of the defense expenses." Id. at 138 (emphasis added).

To determine the insurer's "share of the defense expenses" Utah courts apply an equitable approach that "better reflects what each insurer contracted to provide" taking into consideration the time that each insurer was on the risk and their respective policy limits. *Sharon Steel Corporation v. Aetna Casualty and Surety Company, et al.*, 931 P.2d 127, 140 (Utah 1997). This determination of insurers' share based upon their respective time on the risk does not "essentially argue for adoption of a rule that an insurer has a duty to defend only those claims covered by its insurance policy," as advocated by Unigard. (Appellee's Tenth Circuit Brief, pp. 22 – 23). Indeed, the pro-rata mechanism of apportionment among insurers does not affect the contractual relationship between the insurer and insured that requires the insurer to provide a full defense to all claims. *Texas Property and Casualty Insurance Guaranty Association/Southwest Aggregates v. Southwest Aggregates, Inc.*, 982 S.W.2d 600, 606 (Texas Ct. App. 1999).

Additionally, the equitable "time on the risk" formula does not limit or become inapposite of an insurer's duty to defend simply because the insured must bear part of those defense costs for the periods that it was uninsured, self-insured, or otherwise without coverage.[10] *Sharon Steel*, 931 P.2d at 141-142. In Utah, it is appropriate to treat the insured, here Cloud Nine, as an insurer for periods of time when it was without coverage and to apportion its "fair share" of defense costs. Id.

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[10] Unigard's assertion that Cloud Nine was without insurance for six months because it could not find insurance and Ohio refused to underwrite it, has no foundation in the record. There is literally no evidence or testimony as to why Cloud Nine went without insurance for six months, after Ohio did not renew its policy at the expiration of said policy.

Furthermore, allocating costs to an insured is not limited to only those circumstances where there were "large period[s] of time" that an insured was without coverage. It is not the length of time of non-coverage that governs apportionment to the insured, rather, it is the equitable approach to "[r]eflect a decision by an actor to assume or retain a risk." *Sharon Steel*, 931 P.2d at 141, *quoting Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1202 (2d Cir. 1995).

Moreover, any objection to the apportionment of defense costs to Cloud Nine has been waived. Cloud Nine did not oppose Ohio's allocation arguments nor did it file a separate motion for summary judgment addressing the issue. (Aplt. App. v. 5, pp. 1037 - 1040).

The *Boston* Court extensively discussed the important public policy objections served by a pro-rata or time on the risk allocation among successive insurers and periods of time where an insured is without insurance. Indeed, it quoted the United States Court of Appeals for the Second Circuit which recognized the public policy benefits for pro-rata allocation as follows:

> "[W]here the policies triggered are provided by multiple insurers, [pro rata] allocation avoids saddling one insurer with the full loss, the burden of bringing a subsequent contribution action, and the risk that recovery in such an action will prove to be impossible because, for instance, the insurer of other triggered policies is unable to pay.... Allocation results in the insured bearing the risk of any of its insurers' inability to pay, instead. There is logic in having the risk of such defalcation fall on the insured, which purchased the defaulting insurer's policy, rather than on another insurer which was a stranger to the selection process.
>
> "Allocation also forces an insured to absorb the losses for periods when it self-insured and can prevent it from benefitting from coverage for injuries that took place when it was paying no premiums.... Allocation may also be more efficient because 'any contribution proceeding will involve many of the same issues that are raised in the initial liability proceeding, and ... it is more efficient to deal with these issues in a single proceeding.' "
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> *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 207, 323 (2d. Cir. 2000), quoting *In re Prudential Lines Inc.*, 158 F.3d 65, 85 (2d. Cir. 1998).

> In our view, pro rata allocation produces a more equitable result than joint and several allocation, which "creates a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has *366 purchased only one year of insurance coverage." *Public Serv. Co. of Colo. v. Wallis & Cos.*,986 P.2d 924, 939-940 (Colo. 1999). This false equivalence would tend to "reduce[ ] the incentive of ... property owners to insure against future risks." *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 473, 650 A.2d 974 (1994). This in turn would "reduce the available assets to manage the risk." Id. In sum, the pro rata allocation method promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result. FN38.

The Boston Gas Company v. Century Indemnity Co., 454 Mass 337, 910 N.E.2d 290, 311 (Mass. 2009).

The foregoing clearly demonstrates that the time on the risk method of allocation set forth in *Sharon Steel* should apply here as it is the only method which is consistent with the policy language and it serves important public policy objectives. Accordingly, Ohio requests that this Court answer the Tenth Circuit Court of Appeals' certified question by ordering that the defense costs incurred in defending the Edizone Action should be apportioned as between Ohio, Cloud Nine and Unigard based upon the time on the risk method prescribed in *Sharon Steel*.

CONCLUSION

Ohio requests that the Utah Supreme Court answer the Tenth Circuit Court of Appeals' certified question by declaring that the "other insurance" clauses are not applicable in this case as there are no concurrent insurance policies at issue; that *Sharon Steel's* time on the risk method of allocation does apply, and that Ohio is only liable for the defense costs incurred during its time on the risk. Such a ruling would be consistent with the terms of the policies, this Court's decision in *Sharon Steel* and would serve important public policy objectives.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2009, a true and correct copy of the foregoing Opening Brief of Appellant, Attachments, and Appellant's Index was served upon the persons named below via U.S. first class mail, postage pre-paid to:

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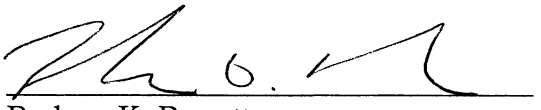

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ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE OHIO CASUALTY INSURANCE COMPANY and WEST AMERICAN INSURANCE COMPANY, Plaintiffs and Cross-Defendants, vs. CLOUD NINE, LLC, et al., Defendants.	ORDER AND MEMORANDUM DECISION Case No. 1:05-CV-88 TC
UNIGARD INSURANCE COMPANY, Plaintiff/Intervenor and Cross-Claimant.	

The parties seek a ruling regarding the scope of two insurance companies' duty to defend the Cloud Nine Defendants in the separate case of Edizone LC v. Cloud Nine LLC, Case No. 1:04-CV-117-TS (D. Utah). One of the insurance companies, Unigard Insurance Company, agreed to defend the Cloud Nine Defendants in Edizone, whereas the other insurance company, The Ohio Casualty Insurance Company, rejected the Cloud Nine Defendants' initial tender of defense. Unigard, in its Motion for Partial Summary Judgment, contends that Ohio Casualty,

like Unigard, has a duty to defend.[1] Unigard further contends that Ohio Casualty should share equally in paying the costs that Unigard has incurred (or will incur) defending the Edizone case.

The court finds that the allegations in Edizone's Complaint allege an advertising injury triggering a duty to defend on the part of Ohio Casualty and Unigard. Also, based on the language of the Ohio Casualty and Unigard policies, the court finds that Ohio Casualty must pay fifty percent of the Cloud Nine Defendants' defense costs in Edizone, with Unigard paying the remaining fifty percent. Accordingly, Unigard's Motion for Partial Summary Judgment is GRANTED.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Unigard insured the Cloud Nine Defendants for a portion of the period at issue in the Edizone case, and it accepted the Cloud Nine Defendants' tender of defense under a reservation of rights when Edizone was filed in August 2004. Ohio Casualty also insured the Cloud Nine Defendants for a portion of the relevant period, but it rejected their initial tender of defense. Ohio Casualty then filed this declaratory judgment action seeking a ruling that it has neither a duty to defend nor a duty to indemnify the Cloud Nine Defendants. Unigard intervened as a plaintiff, contending that it also does not have a duty to defend or indemnify, but if it does, then

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[1]West American Insurance Company is also a plaintiff in this declaratory judgment action. But because no one claims that West American has a duty to defend, it is not part of the motion before the court. (See Unigard's Mem. Supp. Mot. Partial Summ. J. at p. 20 n.3 ("Unigard finds that the *Edizone* Suit does not allege a covered advertising injury against the Cloud Nine Defendants which occurred during the effective periods of the insurance policies issued by West American (June 1998 through June 2001), and therefore does not claim that West American has a duty to defend the Cloud Nine Defendants.").)

[2]No disputed facts exist (indeed, the analysis is based on allegations in Edizone's Complaint and the policy language). The court will discuss the facts throughout the Order as necessary to provide context and analyze the legal issues.

so does Ohio Casualty because the policies are essentially identical.[3] Additionally, Unigard seeks a finding that if both insurers have a duty to defend, Ohio Casualty must share equally in paying defense costs (incurred and to be incurred).

It is important to note that after Unigard filed its Motion for Partial Summary Judgment, Ohio Casualty agreed to defend the Cloud Nine Defendants under a reservation of rights, based on what it believes are materially new allegations in the Second Amended Complaint filed in Edizone. Because Ohio Casualty has since acknowledged a duty to defend from the date of Edizone's Second Amended Complaint (filed in January 2006), the duty-to-defend issue raised by Unigard's Motion is narrowed to whether Ohio Casualty owed a duty to defend before the Second Amended Complaint was filed.

A. **The Insurance Policy**

Ohio Casualty issued a Commercial General Liability Policy to Cloud Nine, LLC, and Easy Seat, LLC, for the period of June 10, 2001, to June 10, 2002. (Ohio Casualty Policy No. BKO (02) 52 34 34 82, attached as Ex. A to Decl. of Rebecca Hill.) The Policy provided coverage for "Personal and Advertising Injury Liability" (Coverage B), as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and **advertising injury**" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. . . .

(Id. at p. 5 of CGL Coverage Form (emphasis added).) According to the Policy, "personal and

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[3]Unigard's Motion addresses only the duty to defend, not the duty to indemnify. Both Unigard and Ohio Casualty contend that no duty to indemnify exists under their respective policies. But that is an issue for another day.

advertising injury" is an "injury . . . arising out of one or more of the following offenses: . . . [t]he use of another's advertising idea in your 'advertisement' . . . ." (Id. at p. 13 (emphasis added).) "Advertisement" is defined as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." (Id. at p. 11.)

The Policy also contains certain exclusions. In particular, the insurance policy does not apply to "personal or advertising injury" that was "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertisement injury'" or that arose "out of oral or written publication of materials, if done by or at the direction of the insured with knowledge of its falsity." (Id. at p. 5 (emphasis added).)[4]

B. Edizone's Complaint

The genesis of the Edizone suit is the alleged breach of a License Agreement allowing the Cloud Nine Defendants to manufacture, use and sell patented elastomer gel technology and product known as "Gelastic," "GellyComb," and "Intelli-Gel" (another name for "GellyComb"). In its initial complaint,[5] Edizone asserts causes of action for (1) patent infringement; (2) breach

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[4]Coverage B of the Unigard Policy provides liability insurance coverage for personal and advertising injury. The insuring provision of Coverage B of the Unigard Policy is identical to insuring provision of Coverage B of the Ohio Casualty Policy. (See Unigard Policy CGL Coverage Form at p. 6, attached as Ex. B to Declaration of Rebecca L. Hill.) The definition of "Personal and Advertising Injury" contained in the Unigard Policy is also identical to the Ohio Casualty Policy. (See id. at p. 17.) And the definition of "advertisement" and policy exclusions in both policies are the same in all relevant aspects. (See id. at pp. 6-7, 14.) Accordingly, the court's ruling on the duty to defend extends to Unigard as well.

[5]As noted above, only the allegations of Edizone's original Complaint (or First Amended Complaint, which adds defendants but does not change the allegations (see Ex. F attached to Hill

of contract; (3) constructive fraud; (4) fraudulent non-disclosure; (5) federal law trademark infringement; (6) common law trade name infringement or common law unfair competition; (7) deceptive trade practices under the Utah Truth in Advertising Act; (8) misrepresentation and false designation of origin under the federal trademark act; and (9) conspiracy. (See Edizone Complaint, attached as Ex. E to Hill Decl.)

According to Unigard, Edizone's Complaint triggers a duty to defend under the "advertising injury" portion of the Policy because it alleges that the Cloud Nine Defendants used Edizone's "advertising ideas" (the trade names GellyComb, Gelastic, and Intelli-Gel) in their advertisement, all to Edizone's detriment. Unigard focuses on Edizone's Sixth, Seventh, and Eighth causes of action to argue that Edizone's allegations trigger Ohio Casualty's duty to defend under the Policy's Coverage B for "personal and advertising injury" liability.

In its Complaint, Edizone describes its Sixth Cause of Action as "Common Law Trade Name Infringement [and] Common Law Unfair Competition." It alleges that the Cloud Nine Defendants "have adopted and taken for themselves the use of Edizone's valuable trade names [GellyComb, Gelastic, and/or Intelli-Gel] by using said names in their businesses, on their websites, and in conjunction with their goods. . . ." (Edizone Compl. ¶ 103, attached as Ex. E to Declaration of Rebecca L. Hill.) Edizone further alleges that the Cloud Nine Defendants' use of those trade names constitutes "common law trade name infringement and unfair competition and is designed to cause confusion and mistake and to deceive purchasers into believing that Defendants' products are somehow sponsored by, made by, or associated with Edizone." (Id.)

Decl.)) are relevant. The court does not consider the allegations of Edizone's Second Amended Complaint, because Ohio Casualty has agreed to defend the Cloud Nine Defendants from the date the Second Amended Complaint was filed.

Edizone contends that, "[a]s a direct and proximate result of Defendants' actions, Edizone will suffer, and has suffered, injury to its trade names and its established good will in the market. Defendants' acts, misconduct, and misappropriation of Edizone's trade names are also likely to cause confusion, mistake, and deceive the public, and have already caused actual confusion. Such injuries are irreparable injuries for which there is no adequate remedy at law." (Id. ¶ 105.)

Under Edizone's Seventh Cause of Action, the Cloud Nine Defendants are accused of violating the Utah Truth in Advertising Act, Utah Code Ann. § 13-11a-3, which "prohibits persons and companies from engaging in deceptive trade practices." (Id. ¶ 108.) Edizone alleges that the Cloud Nine Defendants "engaged in many of the deceptive trade practices enumerated in [§ 13-11a-3], including . . . the causing of confusion or misunderstanding as to the source, sponsorship, approval, or certification of their goods or services; or . . . the causing of confusion or misunderstanding as to their affiliation, connection, association with, or certification by Edizone." (Id.)

And, finally, Edizone's Eighth Cause of Action alleges "Misrepresentation and False Designation of Origin" under 15 U.S.C. § 1125(a). According to Edizone, the Cloud Nine Defendants "appropriated the names GellyComb, Gelastic and/or Intelli-Gel and are using [the names] in their own businesses . . . in a prominent fashion." (Id. ¶ 110.) In particular, Edizone alleges that the Cloud Nine Defendants "use the above trade names to get people to their businesses, where competing products are advertised and sold using said trade name."[6] (Id. ¶ 113.)

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[6]The full set of allegations may be found in Edizone's Complaint (in particular, paragraphs 101-114), which is attached as Exhibit E to the Declaration of Rebecca L. Hill.

C. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56 permits the entry of summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998).

Unigard's Motion involves the interpretation of two insurance contracts and a determination of the insurers' rights and obligations under those contracts. Utah law (which applies in this diversity action) provides that insurance contracts "are interpreted under general contract principles" and that interpretation of such contracts is a question of law to be determined by the courts. Allstate Ins. Co. v. Worthington, 46 F.3d 1005, 1008 (10th Cir. 1995); see also Morris v. Mountain Tel. & Tel., 658 P.2d 1199, 1201 (Utah 1983) ("When the existence of a contract and the identity of the parties are not in issue and when the contract provisions are clear and complete, the meaning of the contract can appropriately be resolved by the court on summary judgment."). Moreover, in Utah, as a general rule, "an insurer's duty to defend is determined by comparing the language of the insurance policy with the allegations of the complaint." Fire Ins. Exch. v. Estate of Therkelsen, 27 P.3d 555 (Utah 2001). Accordingly, the question of whether the insurers have a duty to defend the Cloud Nine Defendants and the question of how defense costs should be allocated are questions of law. Partial summary judgment on the issues presented by Unigard's Motion is appropriate at this time.[7]

[7]Ohio Casualty filed a Rule 56(f) motion seeking a continuance until certain discovery could be conducted. The court denied that motion from the bench during the hearing.

II. DUTY TO DEFEND

A duty to defend arises "when the insurer ascertains facts giving rise to potential liability under the insurance policy." Sharon Steel Corp. v. Aetna Cas & Sur., 931 P.2d 127, 133 (Utah 1997). When the allegations, if proven, show "there is no potential liability [under the policy], then there is no duty to defend." Deseret Fed. Sav. v. U.S. Fid. & Guar., 714 P.2d 1143, 1147 (Utah 1986). Under Utah law, the court must interpret the insurance policy as it would any written contract, under general contract interpretation principles. Benjamin v. Amica Mut. Ins. Co., 140 P.3d 1210, 1213 (Utah 2006). If one claim or allegation triggers the duty to defend, the insurer must defend all claims (that is, covered and non-covered claims), at least until the suit is limited to the non-covered claims. Id at 1216. Finally, and perhaps most important: "'When in doubt, defend.'" Id. at 1215 (quoting Appleman on Ins. Law & Practice § 136.2[C] (2d ed. 2006)).

A. The *Novell* Two-Part Test

Utah state court decisions have not construed "advertising injury" language in insurance policies. But the Tenth Circuit Court of Appeals has established a two-part test to determine whether an advertising injury is alleged, and, consequently, a duty to defend is triggered. See Novell, Inc. v. Fed. Ins. Co., 141 F.3d 983 (10th Cir. 1998). Under that test, the court must first determine whether the complaint alleges a "predicate offense," that is, "one of the offenses specifically listed in the [Policy's] definition of 'advertising injury.'" Id. at 986. If the first part of the test is satisfied, then the court must examine whether there is a causal connection between the alleged injuries and the advertising activities. Id.

Applying the Novell two-part test for establishing an "advertising injury" to the Edizone

case, the court finds that the allegations set forth in Edizone's Complaint satisfy the two-part test and trigger a duty to defend under the policies issued by Ohio Casualty and Unigard.

1. Part One of the Novell Test

First, Edizone's Complaint alleges that the Cloud Nine Defendants committed the predicate offense of "use of another's [Edizone's] advertising idea in your [Cloud Nine's] 'advertisement.'" (See Policy at p.3.) Neither the Policy nor Novell define "advertising idea." But courts from other jurisdictions have done so. An "advertising idea" is an "idea for calling public attention to a product or business, especially by proclaiming desirable qualities so as to increase sales or patronage." Atlantic Mut. Ins. Co. v. Badger Med. Supply Co., 528 N.W.2d 486, 490 (Wis. Ct. App. 1995) (applying ordinary meaning to term "advertising idea"); see also Walk v. Hartford Cas. Ins. Co., 852 A.2d 98, 109 (Md. Ct. App. 2004) (suggesting that advertising ideas are "discrete images or text in an advertisement"); Transportation Ins. Co. v. Freedom Elec., Inc., 264 F. Supp. 2d 1214, 1218 (N.D. Ga. 2003) (an advertising idea is "'any idea or concept related to the promotion of a product to the public'") (quoting Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1188 (11th Cir. 2002)). The discrete trade names of GellyComb, Gelastic, and Intelli-Gel expressly describe and promote the gel-like and elastic qualities of the material, calling the public's attention to the desirable qualities of Edizone's products. Those trade names are "advertising ideas" as that phrase is understood by the average, reasonable purchaser of insurance. See Draughton v. CUNA Mut. Ins. Soc'y, 771 P.2d 1105, 1108 (Utah Ct. App. 1989) (when interpreting insurance contract, court should construe policy as it "would be understood by the average, reasonable purchaser of insurance"); Utah Power & Light Co. v. Federal Ins. Co., 983 F.2d 1549, 1559 (10th Cir. 1993) (applying Utah law and

citing Draughton for same proposition).

Courts also find that where there is no exclusion specific to trademark (as is the case in Ohio Casualty's Policy), the phrase "advertising idea" is a broad enough term to include and provide coverage for trademark infringement. See, e.g., State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Amer., 343 F.3d 249, 256-57 (4th Cir. 2003) (noting that "vast majority" of courts conclude that trademark infringement falls within advertising injury coverage for misappropriation of advertising ideas or style of doing business); CAT Internet Servs., Inc. v. Providence Wash. Ins. Co., 333 F.3d 138, 142 (3d Cir. 2003) (use of trademarks in connection with marketing and sales for the purpose of gaining customers constitutes misappropriation of advertising idea); Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 749 (3d Cir. 1999) ("A trademark can be seen as an 'advertising idea': It is a way of marking goods so that they will be identified with a particular source. . . . [A]llegations of trademark infringement arguably allege misappropriation of an advertising idea."); Central Mut. Ins. Co. v. StunFence, Inc., 292 F. Supp. 2d 1072, 1079 (N.D. Ill. 2003) (finding duty to defend against trademark infringement claim under policy language covering liability for "use of another's advertising idea"). See also Novell, 141 F.3d at 985 ("'Ambiguities in an insurance contract are construed against the insurer.'") (interpreting Utah law) (citation omitted).

Certainly Edizone has alleged "use" of those advertising ideas in the Cloud Nine Defendants' advertisements.[8] For example, Edizone alleges that the Cloud Nine Defendants used

[8]To the extent that cases cited by Ohio Casualty hold that "misappropriation of an advertising idea" does not encompass trademark infringement claims, the court finds those cases distinguishable because the Policy here contains the common term "use," which is broader than "misappropriation." See also Central Mut. Ins. Co. v. StunFence, Inc., 292 F. Supp. 2d 1072, 1079 (N.D. Ill. 2003) (distinguishing decisions limiting "misappropriation of advertising idea" to

Edizone's trade names "in their businesses, on their websites," they "compete directly with Edizone in the same markets" and such conduct "is designed to cause confusion and mistake and to deceive purchasers into believing that Defendants' products are somehow sponsored by, made by, or associated with Edizone." (Edizone Compl. at ¶ 103.) A business's website, except for the web pages concerning the business's contact information and history, is generally an advertisement for the business's goods, services or products. And certainly a website would fall within the Policy's definition of "advertisement": "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." (Policy at p. 11.) Also, Edizone alleges under its claim for Misrepresentation and False Origin that the Cloud Nine Defendants used the trade names Intelli-Gel, GellyComb, and Gelastic "to get people to their businesses, where competing products are advertised and sold using" those trade names. (Edizone Compl. ¶ 22.) In claiming that the Cloud Nine Defendants unlawfully used Edizone's trade names on their websites, Edizone is claiming use of Edizone's advertising ideas in Cloud Nine's advertisements.

Moreover, Edizone alleges a claim under the Utah Truth in Advertising Act, which specifically requires allegations of deceptive trade practices occurring in advertising. "The purpose of [the Utah Truth in Advertising Act] is to prevent deceptive, misleading, and false advertising practices and forms in Utah." Utah Code Ann. § 13-11a-1. Clearly, the crux of a cause of action for violation of the Utah Truth in Advertising Act is advertising.

In short, the Edizone allegations fall within the definition of advertising injury as the

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common law tort of misappropriation in part because the policy at issue in StunFence employed the word "use," not "misappropriation").

offense of "use of another's advertising idea in your 'advertisement,'" and the first part of the Novell test is satisfied.

2. Part Two of the Novell Test

The second part of the Novell test is also met because Edizone's Complaint alleges a causal connection between Edizone's injuries and the Cloud Nine Defendants' advertising activities. Edizone alleges that it has suffered injury to its trade names as a result of the Cloud Nine Defendants' misconduct and it expressly seeks relief prohibiting the Cloud Nine Defendants from using the trade names and trademarks on their websites, in advertising or in any other way. Those claims show the causal connection between Edizone's alleged injury from the Cloud Nine Defendants' use of Edizone's advertising ideas in its advertisements. Cloud Nine's advertising activities "caused [Edizone's] injury – not merely exposed it." See Novell, 141 F.3d at 989.

3. "When in doubt, defend."

Even if the court were to find that Edizone's Complaint presents factual questions or an uncertainty regarding whether an advertising injury is alleged, the insurers still have a duty to defend until those uncertainties are resolved. "Where factual questions render coverage uncertain, . . . the insurer must defend until those uncertainties can be resolved against coverage. 'When in doubt, defend.'" Benjamin, 140 P.3d at 1215 (quoting Appleman on Ins. Law & Practice § 136.2[C] (2d ed. 2006)).

B. Policy Exclusions

Ohio Casualty argues that it owes no duty to defend the Cloud Nine Defendants because the allegations in Edizone's Complaint fall within two different intentional act exclusions in the

Ohio Casualty Policy. According to those exclusions, the Policy does not apply to personal and advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'" or "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity . . . ." (Policy at p. 5.) Ohio Casualty contends that these intentional act exclusions apply because Edizone alleges, or at least its allegations suggest, that the Cloud Nine Defendants knew of their violation of Edizone's rights and knew the illegality of their conduct.

But the causes of action asserted against the Cloud Nine Defendants do not necessarily require that, in order to find liability, the defendant have knowledge of falsity or knowledge that its conduct would cause advertising injury. See 15 U.S.C. § 1114(1) (setting forth elements of trademark infringement); 15 U.S.C. § 1125(a) (setting forth elements of false designation of origin); Utah Code Ann. § 13-11a-3 (defining deceptive trade practices); George v. H.S. Peterson, 671 P.2d 208 (Utah 1983) (discussing the elements of common law trade name infringement).

Courts have found that intentional act exclusions do not negate the duty to defend unless there is no potential for liability under the allegations. See, e.g., Central Mut. Ins. Co. v. StunFence, Inc., 292 F. Supp. 2d 1072, 1081-82 (N.D. Ill. 2003) (in trademark action, "insurer may refuse to defend only if it is clear from the face of the pleading that *all* of the allegations in the Underlying Action fall outside of the policy's actual or potential coverage") (emphasis in original); Elcom Tech., Inc. v. Hartford Ins. Co. of the Midwest, 991 F. Supp. 1294, 1298 (D. Utah 1997) (holding that "knowledge of falsity" exclusion did not negate duty to defend because

false advertising claim could be proved by establishing reckless indifference); Union Ins. Co. v. Knife Co., Inc., 897 F. Supp. 1213, 1217 (W.D. Ark. 1995) (holding that intentional act exclusion did not negate duty to defend: "Since intent is not a required element of trademark infringement, there could be a finding of liability . . . even if the infringement were innocent."); Citizens Ins. Co. v. Pro-Seal Serv. Group, Inc., 710 N.W.2d 547, 555 (Mich. Ct. App. 2005) (holding that intentional act exclusion did not negate duty to defend trademark suit because there was potential for liability even if infringement were negligent, reckless, or innocent).

Given the potential for liability in Edizone's allegations, the exclusions in the Policy do not free Ohio Casualty from its duty to defend. This conclusion is consistent with the Utah Supreme Court's declaration in Benjamin regarding the duty to defend alternative theories of intentional and unintentional liability.

> Where an insurance policy obligates an insurer to defend claims of unintentional injury, the insurer is obligated to do so until those claims are either dismissed or otherwise resolved in a manner inconsistent with coverage. Even where the complaint details egregious, intentional conduct, an expected injury exclusion like the one found in the Homeowners Policy does not relieve an insurer of its duty to defend claims of unintentional injury. Inferences and assumptions about an insured's intent to injure are improper and inconsistent both with the well-accepted practice of alternative pleading and with our oft-repeated instruction that "insurance policies should be construed liberally in favor of the insured and their beneficiaries so as to promote and not defeat the purposes of the insurance."

Benjamin, 140 P.3d at 1215-16 (quoting United States Fid. & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993)).

For all the foregoing reasons, the court holds that both Unigard and Ohio Casualty have a duty to defend the Cloud Nine Defendants in the underlying action of Edizone LC v. Cloud Nine LLC, Case No. 1:04-CV-117-TS (D. Utah).

III. ALLOCATION OF DEFENSE COSTS

Now that the court has determined that both Unigard and Ohio Casualty have a duty to defend against all of Edizone's claims, the next question concerns how they should share the defense costs. According to the Utah Supreme Court, "when apportioning defense costs among insurers, courts 'apply equitable principles . . . unless express policy language decrees the method of apportionment.'" Sharon Steel Corp. v. Aetna Cas & Sur. Co., 931 P.2d 127, 140 (Utah 1997) (emphasis added).

In this case, the Unigard and Ohio Casualty policies have identical provisions for Other Insurance and Method of Sharing, which provide, in relevant part:

> **Other Insurance**
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:
>
> **a. Primary Insurance**
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.
>
> . . . .
>
> **c. Method of Sharing**
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the

total applicable limits of insurance of all insurers.

(Ohio Casualty Policy CGL Form at p. 10 (emphasis added); Unigard Policies CGL Form at p. 13, attached as Ex. B to Hill Decl.) Unigard contends that the "Method of Sharing" provision contained in both policies plainly provides for allocation of equal shares, and because there are two insurers, the court should find as a matter of law that an equal split of defense costs is the appropriate allocation.

Ohio Casualty contends that the Other Insurance provisions quoted above do not apply because the policies are successive, not concurrent. Further, Ohio Casualty advocates the Sharon Steel equitable apportionment of costs based on "time on the risk" rather than an equal share approach between the insurers. According to Ohio Casualty, it owes 3/45ths in defense costs based on a ratio of months on the risk. The court disagrees.

Ohio Casualty argues that the method of sharing set forth in the insurance policies' Other Insurance provisions only applies to the circumstance in which there are two concurrent primary policies, which have overlapping insurance policy periods. Such a limited application is not supported by the specific language of the provisions. Nothing in the provisions' language restricts their application to the circumstance of overlapping and/or concurrent insurance. The introductory paragraph describes the other insurance simply as insurance which is available to the insured for "a loss we cover." The term "loss" is a very broad term, and such "loss" can be caused by multiple "offenses" under Coverage B which can span successive policy periods. Had the insurers meant to limit the application of the Other Insurance provision to concurrent instances only, they could have drafted the language differently. As the policies stand now, there is no limiting language.

Also, Ohio Casualty's suggested allocation method—which includes allocating a six-month period of time to the Cloud Nine Defendants (for a period of time during which they were unable to find and obtain insurance)—essentially advocates the position that an insurer has a duty to defend only those claims covered by its insurance policy. That proposition is directly contrary to Utah case law, which requires an insurer to defend covered and non-covered claims in the same lawsuit until the insurer can limit the suit to claims outside the policy. See, e.g., Benjamin v. Amica Mut. Ins. Co., 140 P.3d 1210, 1216 (Utah 2006) ("'[I]f an insurer has a duty to defend one count of a complaint, it must defend them all.'") (quoting Mt. Airy Ins. Co. v. Greenbaum, 127 F.3d 15, 19 (1st Cir. 1997)).

Based on the plain language of the insurance policies and Utah law regarding the scope of an insurer's duty to defend, the court holds that the defense costs in the Edizone case (incurred and to be incurred) are to be shared by Ohio Casualty and Unigard on an equal basis.

ORDER

For the foregoing reasons, Unigard Insurance Company's Motion for Partial Summary Judgment Regarding Insurers' Defense Obligations is GRANTED.

DATED this 14th day of November, 2006.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

THE OHIO CASUALTY INSURANCE COMPANY and WEST AMERICAN INSURANCE COMPANY, Plaintiffs and Cross-Defendants, vs. CLOUD NINE, LLC, et al., Defendants.	ORDER AND MEMORANDUM DECISION Case No. 1:05-CV-88 TC
UNIGARD INSURANCE COMPANY, Plaintiff/Intervenor and Cross-Claimant.	

On November 14, 2006, the court granted Unigard Insurance Company's Motion for Partial Summary Judgment Regarding Insurers' Defense Obligations. The Ohio Casualty Insurance Company filed a Rule 59(e) Motion for Reconsideration of the Court's Order Allocating Defense Costs. For the reasons set forth below, Ohio Casualty's 59(e) Motion for Reconsideration is DENIED.

Whether to grant or deny a motion for reconsideration under Rule 59(e) is committed to the court's discretion. See Phelps v. Hamilton, 122 F.3d 1309, 1324 (10th Cir. 1997). The Tenth Circuit recognizes only certain grounds for granting such a motion, including those cases where

movants can show: (1) an intervening change in the controlling law; (2) new evidence previously unavailable; or (3) the need to correct clear error or prevent manifest injustice. See Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000); Brumark Corp. v. Samson Resources Corp., 57 F.3d 941, 948 (10th Cir. 1995). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." Servants of the Paraclete, 204 F.3d at 1012. A Rule 59(e) motion should be granted "only if the moving party can present new facts or clear errors of law that compel a change in the court's prior ruling." Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 26 (D.D.C. 2001) (quotations & citations omitted), aff'd 35 Fed. Appx. 1 (D.C. Cir. Mar. 1, 2002). Further, "[i]n order to show clear error or manifest injustice, the [movant] must base its motion on arguments that were previously raised but were overlooked by the Court – '[p]arties are not free to relitigate issues that the Court has already decided.'" United States v. Jasin, 292 F. Supp. 2d 670, 676 (E.D.Pa. 2003) (citations omitted).

Courts routinely deny Rule 59(e) motions in which the movant rehashes old arguments, attempts to re-argue more persuasively issues already presented to and addressed by the Court, or tries to take a second bite at the apple. See, e.g., National Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial Inc., 899 F.2d 119, 123 (1st Cir. 1990) (citing numerous cases for proposition that Rule 59(e) motions are commonly rejected where the movant "was rehashing old arguments already rejected by the trial court"); Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998) ("A motion under Rule 59(e) is not an opportunity to re-argue a case"); Oto v. Metropolitan Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000), cert. denied, Beverley v. Oto, 531 U.S. 1152 (2001) (motions for reconsideration under Rule 59(e)

which "merely took umbrage with the [district] court's ruling and rehashed old arguments," and "did not demonstrate that there was disregard, misapplication or failure to recognize controlling precedent . . . were properly rejected by District Court"); Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (upholding denial of Rule 59(e) motion where motion "presented no arguments that had not already been raised").

In its motion for reconsideration, Ohio Casualty repeats and re-emphasizes arguments it presented to the court during initial consideration of Unigard's Motion for Partial Summary Judgment. The court does not find the arguments persuasive. To the extent Ohio Casualty disagrees with the court's decision, such a matter is for the Tenth Circuit Court of Appeals.

For the foregoing reasons and for the reasons set forth in the court's November 14, 2006 Order, Ohio Casualty's Rule 59(e) Motion for Reconsideration of the Court's Order Allocating Defense Costs is DENIED.

SO ORDERED this 4th day of January, 2007.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE OHIO CASUALTY INSURANCE COMPANY, an Ohio corporation; and WEST AMERICAN INSURANCE COMPANY, an Indiana corporation, UNIGARD INSURANCE COMPANY Plaintiffs, vs. CLOUD NINE, LLC, a Utah corporation; EASY SEAT, LLC, a Utah corporation; RODNEY FORD, a New York resident, individually; BLAINE FORD, a Utah resident, individually and REX HADDOCK, a Utah resident, individually Defendants.	**ORDER ON STIPULATED MOTION TO DISMISS** Civil No. 1:05CV00088 TC Judge Tena Campbell
CLOUD NINE, LLC, a Utah corporation; EASY SEAT, LLC, a Utah corporation; RODNEY FORD, a New York resident, individually; BLAINE FORD, a Utah resident, individually; and REX HADDOCK, a Utah resident, individually, Counterclaim Plaintiffs	

vs. THE OHIO CASUALTY INSURANCE COMPANY, an Ohio corporation; and WEST AMERICAN INSURANCE COMPANY, an Indiana corporation, Counterclaim Defendants	
UNIGARD INSURANCE COMPANY, a Washington corporation, Plaintiff/Intervenor and Cross Claimant vs. THE OHIO CASUALTY INSURANCE COMPANY, an Ohio corporation; and WEST AMERICAN INSURANCE COMPANY, an Indiana corporation, Cross-Claim Defendants	

THE COURT, having fully considered the Stipulated Motion to Dismiss, having reviewed the record, and for good cause shown, it is hereby

ORDERED, that all remaining claims pending in the above action are hereby dismissed with prejudice. This Order shall not abridge any parties' right to appeal the Court's ruling issued on November 14, 2006 (motion for reconsideration denied on January 24, 2007), regarding the

allocation of defense costs and all attorneys' fees incurred in the underlying action entitled *Edizone, LC, v. Cloud Nine, LLC, et. al.*, Civil No. 1:04CV00117 TS.

DATED this 27 day of Nov, 2007.

BY THE COURT

THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT COURT JUDGE

APPROVED AS TO FORM:

BERRETT & TAYLOR, L.C.

/S/ Barbara K. Berrett
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IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

The Ohio Casualty
Insurance Company,

Appellant,

v.

Case No. 20090340-SC
No. 08-4003

Unigard Insurance Company,

Appellee.

ORDER

This matter is before the Court on certification of a question of state law by the Tenth Circuit Court of Appeals.

IT IS HEREBY ORDERED that the Utah Supreme Court accepts the following question certified to it:

As to the EdiZone case described by the certification order, whether the defense costs should be allocated between Appellant and Appellee under the "equal shares" method set forth in the "other insurance clause" of Appellant's policy or according to the "time on the risk" method described in Sharon Steel Corp. v. Aetna Casualty & Surety Co., 931 P.2d 127, 140 (Utah 1997).

The certifying court has not filed any portion of the record in this matter with this Court. Within fourteen days of the date of this order, counsel for the parties shall advise this Court as to what portions of the record they believe necessary for consideration of the certified questions.

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2009, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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U.S. COURT OF APPEALS
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Dated this June 18, 2009.

By _____
Judicial Assistant

Case No. 20090340
U.S. COURT OF APPEALS, 08-4003